Filed 3/3/09 Marinaro v. Hanger, Levine & Steinberg CA2/1

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

| | |
|---|---|
| RONALD MARINARO,<br><br>Plaintiff and Appellant,<br><br>v.<br><br>HANGER, LEVINE & STEINBERG,<br><br>Defendant and Respondent. | B205629<br><br>(Los Angeles County<br>Super. Ct. No. BC346742) |

APPEAL from a judgment of the Superior Court of Los Angeles County. James R. Dunn, Judge. Reversed.

Tesser & Ruttenberg and Brian M. Grossman for Plaintiff and Appellant.

Hinshaw & Culbertson and Filomena E. Meyer for Defendant and Respondent.

---

Plaintiff Ronald Marinaro ("Marinaro") alleges that the defendant law firm Hanger, Levine & Steinberg ("Hanger Firm") committed legal malpractice in its defense of Marinaro in a prior suit arising from a nascent business relationship between Marinaro and William Richert ("Richert"). The trial court granted the Hanger Firm's motion for summary judgment because it concluded that Marinaro's opposition thereto invalidly contradicted prior sworn deposition testimony of the two declarants and was also too speculative. We disagree and therefore reverse.

## BACKGROUND[1]

In the course of performing his professional services as a chiropractor, Marinaro fell into discussion with his patient Richert about the latter's plan to establish a business that would involve the roasting of soy beans in such a fashion that the product would mimic the taste of coffee. In the underlying action, Richert alleged that a partnership was formed for the purpose of engaging in the soy-coffee business, but that Marinaro breached contractual and fiduciary obligations to Richert by taking the ideas and knowledge gained in the parties' conversations and starting a separate, competing business of his own.

After receipt of Richert's complaint, Marinaro tendered its defense to State Farm General Insurance Company ("State Farm"), from which he had purchased a Commercial Liability Policy and an Umbrella Policy. State Farm decided to defend the case, with a reservation of rights, and engaged the Hanger Firm to represent Marinaro. (State Farm is also a defendant in the present action, but is not a party to this appeal.) In the course of this representation, the Hanger Firm wrote several reports to State Farm with its analysis of the suit. In doing so, the Hanger Firm generally painted a gloomy picture

---

**1** "'Because this case comes before us after the trial court granted a motion for summary judgment, we take the facts from the record that was before the trial court when it ruled on that motion.' . . . We liberally construe the evidence in support of the party opposing summary judgment and resolve doubts concerning the evidence in favor of that party." (*Wilson v. 21st Century Ins. Co.* (2007) 42 Cal.4th 713, 716-717. For the purpose of this motion, the facts set forth are largely undisputed.

of Marinaro's prospects for the defense of Richert's claims. The details of those letters need not be fully recited here, but they are best summarized in the Hanger Firm's April 15, 2004 report to State Farm that "we believe that [Richert] will prevail" and ". . . the measure of damages would be devastating to [Marinaro]."

Marinaro alleges that none of these dire predictions was communicated to him in any manner. On the contrary, he states that he was told by Robert Levine of the Hanger Firm that he expected to prevail and that he had "never lost a case." Pretrial settlement discussions were unsuccessful, with Marinaro now contending that he was then imbued with confidence by the rosy outlook given him by his attorneys.

Perspicacious readers will intuit what happened next. In August 2004, a jury rendered a verdict awarding Richert more than $14.5 million in compensatory and punitive damages against Marinaro. Appellate review resulted in the affirmance of awards of $526,000 for economic damages and $60,000 for non-economic damages. Awards of a further $6 million for compensatory damages and $8 million for punitive damages were vacated because the appellate court concluded that these sums had been improperly calculated. The case was returned to the trial court for possible corrective action in regard to these latter amounts.

While the underlying action was again pending in the trial court, and after the present case was filed, Richert's action was settled for payments including $120,000 that had been collected through levy, a further $210,000 in cash from Marinaro, and the assignment of 30% of Marinaro's gross recovery in this lawsuit.

The essence of Marinaro's claim against the Hanger Firm is his contention that his lawyers had a professional obligation to advise him about the merits of Richert's claims and that their failure to discharge that duty kept him from negotiating a settlement for less than the amount which that case ultimately cost him. The Hanger Firm's motion for summary judgment focused on the damages claimed by Marinaro, contending that there is no proper, competent evidence that either Richert or Marinaro would have settled, before the trial, for any amount less than their ultimate settlement. The motion was

supported principally by excerpts from the depositions at which Richert and Marinaro described their pretrial negotiations and revealed thoughts which they then held about the settlement terms which might have been acceptable to them. The Hanger Firm urges that this deposition testimony shows that the case could not have been settled for any amount less than the sum to which the parties later agreed post-trial. Marinaro's opposition to the summary judgment motion relied almost exclusively upon declarations from Richert and Marinaro purportedly showing that a less expensive settlement would have been achieved before the underlying trial if Marinaro had been advised that he was likely to suffer a significant loss at that trial.

The trial court gave no weight to the plaintiff's opposing evidence, dismissing it as "self-serving statements based on hindsight which contradict prior sworn testimony in depositions. The court disregards such evidence under the law of *D'Amico*." The court further sustained objections to the essential parts of the Richert and Marinaro declarations upon the basis that those statements were "speculative." After these two fatal blows to the opposition, the inevitable consequence was the granting of the Hanger Firm's motion for summary judgment.

**DISCUSSION**

The "law of *D'Amico*" referenced by the trial court has grown substantially since its origin in the case of *D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1. It is now often recited, as in *Benavidez v. San Jose Police Dept.* (1999) 71 Cal.App.4th 853, 860 that a "party cannot create an issue of fact by a declaration which contradicts his prior [discovery responses]." The *D'Amico* case itself did not require such a rule, because that opinion mentions no evidence that conflicted with the admissions made by anyone during discovery.

Among the progeny of *D'Amico* is *Price v. Wells Fargo Bank* (1989) 213 Cal.App.3d 465, which noted that directly conflicting testimony given by the same witness before trial and during trial is normally weighed by the trier of fact. That court therefore urged caution in the application of a rule which grants summary judgment

without this traditional weighing of such evidence. "We do not interpret the [*D'Amico*] decision, however, as saying that admissions should be shielded from careful examination in light of the entire record. A summary judgment should not be based on tacit admissions or fragmentary and equivocal concessions, which are contradicted by other credible evidence." (*Id*. at p. 482.)

***Richert evidence.*** In a declaration submitted in support of Marinaro's opposition to the Hanger Firm's motion for summary judgment, Richert described some of the pretrial negotiations in the underlying case. He stated: "Had Marinaro offered $200,000 instead of $100,000, I would have accepted his offer, regardless of whether he also offered a percentage of the sales of Rocamojo." (Rocamojo was the company Marinaro started, allegedly for the purpose of using the soy-coffee technology and strategies he learned from Richert.) There is no contrary testimony by Richert in the record. In its Reply in support of the motion for summary judgment, the Hanger Firm submitted excerpts of Richert's deposition which had been taken four months earlier. That deposition testimony can best be characterized as vague and imprecise. Richert variously described his goals in the prior case: He wanted an interest in Marinaro's new business. (He thought getting 100% "would be fair," but "I would take 50%.") He wanted money. ("I personally would have taken $100,000," net of fees for his lawyer/partner. He wanted Marinaro to offer $200,000 because "I figured $200,000 would pay the lawyers," but "I never said [I]would have taken $200,000.") He may have insisted that an interest in Marinaro's business be included in the deal, but this is hardly clear. (Richert was asked "In fact, that (getting some ownership of the defendant's business) was not a deal term or deal point that you were willing to negotiate?" He answered: "No." What does that answer mean?) This vague and scattered testimony requires the invocation of the admonition in *Price* about the limited value of "tacit admissions or fragmentary and equivocal concessions."

***Marinaro evidence.*** In opposing the Hanger Firm's motion, Marinaro declared that, if he had known of that firm's bleak prognosis for his defense, he "would have

increased [his] settlement offer to at least $250,000." His earlier deposition testimony was that he "might have come up with a hundred or a 150" and that during those negotiations he did not have in mind a maximum that he would be willing to contribute. Also: "I didn't have a number in mind what I would finally settle at." Are these answers inconsistent with his later declaration? Perhaps; perhaps not. Congruity of these answers is not the important issue here, because the questions are not the same. "What were you considering in your ignorant, uninformed, and optimistic state of mind?" is quite different from "What would you have offered in order to avoid a 'devastating' adverse judgment that was anticipated by your expert counsel?" Denying Marinaro the opportunity now to put himself in that state of mind ("I am about to be ruined.") would essentially make the Hanger Firm's alleged error impervious to challenge. Even Nostradamus would not say "My top offer before trial was $x because my attorneys assured me that I would prevail, but I also then had in mind that if, perchance, my trusted counsel are deceiving me and I am really facing imminent disaster, then my top offer is $xx." The lawyers should not expect their clients to think in those terms. Marinaro's testimony is indeed "hindsight," but the alternative is to ask him to testify about a state of mind that no lawyer should want or expect a client to have. That is: "This is what I feel because I know that you are lying to me."

"Speculative" is an elusive objection. Many texts and treatises on evidence do not even index this term. This is perhaps explained by the CEB book on Trial Objections, which states that a "more precisely worded objection" would assert a lack of personal knowledge or lack of foundation. (Heafey, Cal. Trial Objections (Cont.Ed.Bar 2008) Stating the Objection, § 16.7, p. 160.) These terms reveal that Richert and Marinaro were qualified to testify about their states of mind at the time of these negotiations.

The ultimate trier of fact in this litigation can evaluate the testimony tendered in opposition to this motion for summary judgment. It may also be appropriate to consider (1) that both Richert and Marinaro have a financial interest in the outcome of this trial,

(2) that there seems to be no written record of the negotiation strategies that were not revealed before the underlying trial, and (3) that Marinaro's hypothesis about what his earlier action might have been fits nicely within the limited range that could make this case viable. That fact-finder might also hear a version of the communications between Marinaro and the Hanger Firm that is markedly different from the allegations in this complaint. The grant of this motion for summary judgment has improvidently deprived all participants of the opportunity to present such evidence.

## DISPOSITION

The order granting summary judgment is reversed, with directions that the motion be denied. Appellant shall recover costs incurred in this appeal.

NOT TO BE PUBLISHED.

BAUER, J.*

We concur:

MALLANO, P. J.

ROTHSCHILD, J.

---

* Judge of the Orange County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.